

# Preamble

The following are guidelines for lawyers and nonlawyer professionals appointed as guardians ad litem for children in most family court cases. It is emphasized that these guidelines are not standards of conduct for guardians ad litem in all proceedings. To begin with, decisions to be made on behalf of children by a guardian ad litem are always affected by the particular facts and circumstances of the case and the type of litigation. Moreover, such decision-making by definition calls for a guardian ad litem to exercise judgment and discretion-functions that are not easily standardized.

These guidelines are offered to orient lawyers and nonlawyers to the roles they are called on to play as guardians ad litem for a child in court proceedings. They are also offered to guide decision-making by a child's guardian ad litem and help formulate the relationship between the child and the guardian ad litem. Because they are guidelines, however, they are not intended to serve as a basis for a standard of care or to create a legal duty.

Finally, these guidelines are not intended to supplant the Rules of Professional Conduct for lawyers appointed as lawyers to represent children or to contradict the South Carolina Rules of Civil Procedure, South Carolina Rules of Family Court, South Carolina Rules of Evidence or South Carolina law.

Reference is made to Rule 1.14 of the Rules of Professional Conduct at Rule 407 of the South Carolina Appellate Court Rules. Counsel appointed as a lawyer for a child is governed by the rules of professional conduct in ways that might depart from these guidelines. For example, while neither South Carolina law nor these guidelines recognize the existence of a client privilege for the benefit of a child with a guardian ad litem, a lawyer appointed as counsel will be guided by the Rules of Professional Conduct which recognize such a privilege.

# Guidelines

## QUALIFICATIONS

1. A guardian ad litem must be an adult who should
  - a) be able to make independent, mature and informed decisions on issues involved in the case;
  - b) employ impartiality, open-mindedness and fairness in determining what is in the best interest of the child;
  - c) have not represented a person or party in pending or past litigation involving the child;
  - d) have not been convicted of any crime listed in Chapter 3 of Title 16, Offenses Against the Person; Chapter 15 of Title 16, Offenses Against Morality and Decency; Article 3 of Chapter 53 of Title 44, Narcotics and Controlled Substances; or for the crime of contributing to the delinquency of a minor, provided for in § 16-17-490; and

e) have received appropriate training or experience.

### **TRAINING/EXPERIENCE**

**1.** Appropriate training or experience of the guardian ad litem would include the following areas:

- a) the court process, including alternative dispute resolution and testifying
- b) interviewing techniques
- c) resources available to guardians ad litem
- d) report drafting
- e) record keeping
- f) investigation skills
- g) lawyer/guardian ad litem roles and duties including ethical issues
- h) negotiation skills
- i) methods for minimizing the potential stress to the child or the child's family caused by the court process
- j) cultural, ethnic, economic and social differences
- k) social, emotional, physical, developmental, education, vocational and psychological stages and needs of children
- l) services and benefits available for children (i.e., school related issues; special education; health care issues; and government benefits)
- m) role and procedures of relevant agencies
- n) relevant statutes (i.e., § 20-7-121 et seq.) Child Welfare Reform and Adoption Assistance Act.

**2.** The court may waive the training qualification upon finding the person being appointed is qualified due to prior experience as a guardian ad litem or is otherwise competent. This finding should be reflected in the order of appointment.

### **ROLE**

**1.** A guardian ad litem for a minor child is a special guardian appointed by the court in particular litigation. The guardian ad litem is lawfully invested with the power and charged with the duty of protecting the child's interests in the litigation.

**2.** The guardian ad litem is subject to all the rules of the court and shall receive all pleadings, notices, discovery, correspondence relating to the child, orders and notices of appeal.

### **RESPONSIBILITIES**

**1.** A guardian ad litem should conduct an independent investigation to determine what is in the best interest of the child.

**2.** A guardian ad litem should interview the parties, parents and caretakers of the child, unless it would be contrary to the child's interests or otherwise inappropriate under the circumstances. If the parties are represented by counsel, the guardian ad litem should respect the attorney-client relationship and obtain the consent of the parties' lawyer before the interview. Unless the parents' interests conflict with those of the child, the guardian ad litem should give deference to their wishes, absent a good reason to do otherwise.

**3.** A guardian ad litem should communicate with the child, as appropriate in light of the child's age and maturity. The guardian ad litem should explain the role which the guardian will play in the particular litigation and the nature of the relationship the child should expect to have with the guardian ad litem. The guardian ad litem should be careful not to raise unreasonable expectations and, keeping in mind the temporary nature of the relationship, should maintain objectivity. A guardian ad litem should keep the child generally informed about the status of the litigation and the child's interests that may be affected by the litigation. A guardian ad litem should explain to the child what he or she thinks is best for the child, even if it conflicts with the child's wishes.

**4.** A guardian ad litem should strive to protect confidential communications with the child and help the child understand that anything that he or she tells the guardian ad litem may be revealed. A guardian ad litem should carefully explain to a child under what circumstances the guardian is allowed, or may be compelled, to disclose the child's confidences. A guardian ad litem should give appropriate deference to the wishes of the child in deciding whether to disclose a confidential communication absent an appropriate reason for doing otherwise.

**5.** Commensurate with the child's age, experience, maturity and judgment the guardian ad litem should consult with the child about the proceedings and other issues affecting the child. A guardian ad litem should recognize that children have varying degrees of competence and, to the extent a child is able to articulate an opinion about the ultimate outcome of the proceeding, that the child's opinion is entitled to varying degrees of weight. In any case in which the guardian ad litem must make important decisions on behalf of the child, the guardian ad litem should consider all the surrounding circumstances and act with care to safeguard and advance the best interests of the child.

**6.** In rare circumstances, independent legal representation of the child may be appropriate—for example, when a child of sufficient age and maturity has a substantial and material conflict with the position of the guardian ad litem regarding the proceedings. If the conflict is unresolvable, the guardian ad litem should move for a hearing on the issue. If the court finds that the child is capable of mature and independent decisions, the guardian ad litem may be dismissed and a lawyer appointed for the child. The guardian ad litem must continue in addition to the child's lawyer in cases where required by statute. (See, e.g. S.C. Code Ann. § 20-7-110)

**7.** A guardian ad litem should inform the court of the relevant wishes of the child, irrespective of the child's age. This is a responsibility of the guardian ad litem regardless of whether the child's expressed wishes coincide with the opinions of the guardian ad litem regarding the best interests of the child. If the child does not have a lawyer, the guardian ad litem should assist the child in conveying the child's wishes to the court through

appropriate means, such as testimony or the introduction of evidence.

**8.** A guardian ad litem should perform assigned duties competently and should be prompt, diligent and attentive to details to assure that the matter undertaken is completed without avoidable harm to the-child's best interests.

**9.** If a lawyer is appointed or retained to represent the guardian ad litem, the guardian ad litem is the client. The guardian ad litem is owed the same duties and has the same rights as any other client, including the right to determine the objectives of the litigation and to receive legal advice and counseling. It is the responsibility of the guardian ad litem to request the appointment of a lawyer when necessary.

**10.** In judicial proceedings involving issues affecting a child's interest, a guardian ad litem should through counsel (unless the guardian ad litem is a lawyer) introduce evidence, examine and cross-examine witnesses, and present the child's positions to the court. The guardian ad litem should otherwise participate in the proceedings to the degree necessary to protect the child's interest. If the guardian ad litem becomes aware of benefits and services to which the child is entitled, the guardian ad litem should bring these issues to the attention of the court.

**11.** A guardian ad litem may advocate a position in court on any issue concerning the interests of the child. Any recommendation to the court must be based on evidence in the record. A guardian ad litem may submit briefs, memoranda, affidavits or other documents on behalf of the child the same as any other party. Any report or recommendation of a guardian ad litem must be submitted in a manner consistent with the rules of evidence and other South Carolina law.

**12.** In child protection cases, written reports including recommendations should be submitted to the court pursuant to statute. In other types of cases, a guardian ad litem should submit a written report only when required to do so by the court or by statute.

**13.** A guardian ad litem appointed by the court shall be paid the amount assessed by the court or agreed upon between the parties and the guardian ad litem. A guardian ad litem should submit itemized statements based on time and expense records. At the earliest possible time the guardian ad litem should notify the parties of any proposed fee schedule. Fee arrangements among private parties are not precluded by these guidelines and should be set forth in writing.

**14.** In dealing with an unrepresented party, the guardian ad litem should take steps to assure that the party understands the guardian ad litem's purpose and that the guardian is not serving as a lawyer for any party. A guardian ad litem should not give advice to unrepresented parties but may answer questions about resources and procedures for - obtaining a lawyer. If the guardian ad litem believes that an unrepresented party may be incompetent, this suspicion should be brought to the attention of the court as soon as reasonably possible with notice to the other parties.

**15.** The duties of the guardian ad litem continue until relieved by the court or upon entry of a final judgment. The guardian ad litem should be mindful that the litigation may not be

concluded until all appeals and subsequent proceedings are final. The level of participation in the appeals process is to be determined by the guardian ad litem based on the facts and circumstances of the case and the child's best interests.

**16.** Guardians ad litem should recognize the need for continuity of representation and be prepared to serve throughout all stages of the case. Guardians ad litem who are unable to continue to serve should cooperate fully with successor guardians ad litem.